

1411276 (Migration) [2015] AATA 3214 (23 July 2015)

DECISION RECORD

DIVISION: Migration & Refugee Division

REVIEW APPLICANT: Mr Mervyn Louis Lane

VISA APPLICANTS: Ms Sakorn SOK
Master Savuth Nget

CASE NUMBER: 1411276

DIBP REFERENCE(S): OSF2013/088976

MEMBER: Catherine Carney-Orsborn

DATE: 23 July 2015

PLACE OF DECISION: Sydney

DECISION: The Tribunal remits the application for a Prospective Marriage (Temporary) (Class TO) visa for reconsideration, with the direction that the first named visa applicant meets the following criteria for a Subclass 300 (Prospective Marriage) visa

- cl.300.216 of Schedule 2 to the Regulations; and
- cl.300.221 of Schedule 2 to the Regulations
- The proper course is to remit the application for consideration whether the other criteria are met by the first and second named visa applicants.

Statement made on 23 July 2015 at 3:47pm

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of decisions made by a delegate of the Minister for Immigration to refuse to grant the visa applicants Prospective Marriage (Temporary) (Class TO) visas under s.65 of the *Migration Act 1958* (the Act).
2. The visa applicants applied for the visas on 28 March 2013. At the time the visa application was lodged, Class TO contained only one subclass: Subclass 300 (Prospective Marriage). The criteria for a Subclass 300 visa are set out in Part 300 of Schedule 2 to the Migration Regulations 1994 (the Regulations). The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria. Relevantly to this matter the primary criteria include cl.300.216 and cl.300.221.
3. The delegate refused to grant the visas on 5 May 2014 on the basis that the first named visa applicant did not satisfy cl.300.216 of Schedule 2 to the Regulations because they were not satisfied on the evidence of a genuine intention to be in a genuine and continuing relationship with each other.
4. The review applicant appeared before the Tribunal on 15 July 2015 to give evidence and present arguments. The Tribunal also received oral evidence from the visa applicant, the review applicant's daughter and the person who introduced the parties. The Tribunal hearing was conducted with the assistance of an interpreter in the Khmer and English languages.
5. The review applicant was represented in relation to the review by his registered migration agent. The representative attended the Tribunal hearing.
6. For the following reasons, the Tribunal has concluded that the matter should be remitted for reconsideration.

CONSIDERATION OF CLAIMS AND EVIDENCE

7. The issue in the present case is whether the parties have a genuine intention to marry and live together as spouses within the meaning of cl.300.216.
8. Clause 300.211 requires that at the time of application the visa applicant intends to marry a person who is an Australian citizen or Australian permanent resident or an eligible New Zealand citizen. The Tribunal has before it evidence of the review applicant's identity and status. The Tribunal is satisfied that he is an Australian citizen.
9. Clause 300.214 requires that at the time of application the parties have met and are known to each other personally. This requires the parties to have come together in each other's company or physical presence: *MIAC v Yucesan* (2008) 169 FCR 202.
10. The Tribunal has considered all the evidence before it. The Tribunal has movement records which indicate that the review applicant has spent a considerable amount of time in Cambodia. The review applicant has been to Cambodia to visit the visa applicant five times since October 2012. The Tribunal has considered the large amount of evidence which was provided to the Tribunal by the review applicant. The Tribunal has considered the statements of friends, family and photographs. The Tribunal is satisfied the parties have met and are known to each other personally.

11. Accordingly, the Tribunal finds that the requirements of cl.300.214 are met.
12. Clause 300.215 requires that at the time of application the parties have a genuine intention to marry, and that the marriage is intended to take place within the visa period. The review applicant provided including advertisements in newspapers, evidence of a religious ceremony in Cambodia, application to register a civil partnership and other evidences of planning a wedding.
13. At the time of application the parties had a genuine intention to marry and satisfy the requirements of cl.300.215(a). The proposed date for the marriage is within the visa period as required by cl.300.215(b). Therefore, the requirements of cl.300.215 are met.
14. Clause 300.216 requires that at the time of application 'the parties genuinely intend to live together as spouses'. 'Spouse' is defined in s.5F of the Act and provides that a person is the spouse of another where those two people are in a married relationship. Persons in a married relationship must be married to each other under a marriage that is recognised as valid for the purposes of the Act; there must be a mutual commitment to a shared life as husband and wife to the exclusion of all others, the relationship must be genuine and continuing, and the couple must live together, or not live separately and apart on a permanent basis: s.5F(2)(a)-(d). In considering an application for a Prospective Marriage (Temporary) (Class TO) visa, the Tribunal may have regard to the considerations set out in r.1.15A(3) for spousal relationships: r.1.15A(4). Whilst it is not appropriate to consider whether the parties are spouses at the time of application or time of decision, an investigation of the parties' intentions with regard to the definition of spouse in legislation may assist in determining the parties' aspirations.
15. Having regard to the considerations for a spousal relationship, and the degree to which these factors may be applied to determine a future intention, the Tribunal makes the following findings.
16. The Tribunal had available to it a significant amount of evidence which was not provided to the Department.
17. The review applicant provided supporting statements from his family including his sister and daughter. His daughter attended the hearing to give evidence in person. The review applicant provided supporting statements and letters in the way of references from employers and friends.
18. The review applicant provided evidence of his travel and stay in Cambodia on five occasions. He supplied evidence of his sending financial support to the visa applicant.
19. Evidence was supplied of his stay with the visa applicant in hotels in Cambodia. At the hearing he displayed knowledge of her and her family. He stated that he had been to her home however he was more comfortable at a hotel.
20. Evidence has been supplied from the visa applicant's family and also the review applicant's close relatives.
21. The Tribunal is satisfied on the evidence that the review applicant has a genuine intention to live as a spouse with the visa applicant.
22. The Tribunal has concerns about the visa applicant's intentions. The Tribunal was further concerned about the visa applicant's limited English.

23. The review applicant and his witnesses gave convincing evidence that the review applicant and visa applicant were able to communicate through broken English. The Tribunal put to the review applicant and his daughter its concerns. They both gave strong evidence that they believed the relationship was genuine and there was a future intention to live together as spouses.
24. The visa applicant gave evidence of her commitment to the review applicant at the hearing.
25. She stated that they communicate via electronic means. The review applicant gave an example of how he communicates with the visa applicant at the hearing. The communication was halting and difficult however the Tribunal after considering all the evidence provided is satisfied that communication is possible.
26. The Tribunal is further satisfied that given the long extended trips the review applicant has made to stay with the visa applicant in Cambodia that there is a genuine intention to marry.
27. At the time of application the parties did have a genuine intention to live together as spouses, and therefore cl.300.216 is met.
28. Clause 300.221 requires that at the time of decision, the visa applicant continues to satisfy the criteria in cl.300.211, 300.214, 300.215 and 300.216. That is, that visa applicant intends to marry an Australian citizen, permanent resident or eligible New Zealand citizen; that the parties have met and are known to each other personally; that the parties genuinely intend to marry and intend to do so during the visa period; and that the parties genuinely intend to live together as spouses.
29. After considering all the evidence provided including the oral evidence of the parties and the witnesses the Tribunal is satisfied that the visa applicant intends to marry the review applicant who is an Australian citizen. The Tribunal is further satisfied that the parties have met and spent a considerable amount of time together and that they genuinely intend to marry in the visa period and live together as spouses.
30. Accordingly, cl.300.221 is met.
31. Given the findings above, the appropriate course is to remit the application for the visa to the Minister to consider the remaining criteria for a Subclass 300 visa.

DECISION

32. The Tribunal remits the application for a Prospective Marriage (Temporary) (Class TO) visa for reconsideration, with the direction that the first named visa applicant meets the following criteria for a Subclass 300 (Prospective Marriage) visa:
 - cl.300.216 of Schedule 2 to the Regulations; and
 - cl.300.221 of Schedule 2 to the Regulations
 - The proper course is to remit the application for consideration whether the other criteria are met by the first and second named visa applicants.

Catherine Carney-Orsborn
Member